BAE Systems Ordnance Systems, Inc. v. Fluor Federal Solutions, LLC, 7:20CV587, 12/15/2021

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

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BAE Systems Ordnance Systems, Inc.,

Plaintiff,

vs.

FLUOR FEDERAL SOLUTIONS, LLC,

Defendant.

CIVIL CASE NO.: 7:20CV587
DECEMBER 15, 2021, 4:01 P.M.
MOTIONS HEARING VIA ZOOM

Before:
HONORABLE ROBERT S. BALLOU
UNITED STATES MAGISTRATE JUDGE
WESTERN DISTRICT OF VIRGINIA

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(Proceedings commenced, 4:01 p.m.)

THE COURT: Let me just go ahead and call the case. Ms. Brown, call the case and I'll just have everyone identify themselves.

THE CLERK: BAE Ordinance Systems, Inc. versus Fluor Federal Solutions, LLC, Civil Action Number 7:20cv587.

THE COURT: All right. Let the record reflect the parties are present by counsel.

All right. Mr. Treece, you can go ahead and just identify who you have there with you today.

MR. TREECE: Certainly, Your Honor. Joshua Treece on behalf of BAE. With me I have Justin Simmons.

THE COURT: All right. Anyone else on behalf of BAE there with you?

MR. TREECE: Not in my office, but here present via video.

THE COURT: Okay. Go ahead and identify those folks.

MR. TREECE: Sure. Catherine Ronis, vice president and associate general counsel for BAE; Joe Port, senior in-house counsel for BAE; and Todd Conley, outside counsel for BAE.

THE COURT: All right. Good afternoon. I hope you're doing well.

MR. TREECE: And Your Honor, I'm sorry, Karen Stemland is also with us on behalf of BAE. I couldn't scroll

over. I didn't see her face.

THE COURT: Ms. Stemland had more than enough of me last Friday for mediation. Karen, it's good to see you again.

All right. Mr. Fitzsimmons, I guess you're here on behalf of Fluor?

MR. FITZSIMMONS: I am, Your Honor. And I'm going to allow my partner, Kathleen Barnes, to introduce us.

MS. BARNES: I am Kathleen Olden Barnes on behalf of Fluor Federal Solutions. With me, as you've already recognized, is Scott Fitzsimmons, and also Sarah Bloom. We also have in attendance Jonathan Conte, who is senior counsel at Fluor.

THE COURT: Is that the person that looks like he's in a witness protection program there?

(Laughter.)

MS. BARNES: Yes. He asked that we blur his face.

(Laughter).

THE COURT: All right. Very well.

MR. CONTE: It's better off that way, Your Honor.

THE COURT: Well, thank you all very much for being here. We're here on dockets 63 and 65, which are the competing motions that have been filed first by BAE to stay the case and bifurcate, and the motion filed by Fluor to compel discovery and for attorneys' fees.

I can tell you one way almost certain I'm going to

rule is the issue regarding bifurcation I'm going to pass to Judge Urbanski. It touches upon trial and what would happen in trial. And typically the way that we have had a division of labor over here is that anything that will touch upon how a trial will go forward, evidence that would come in, issues that would be before the judge or the jury, as the case may be, are typically reserved for the district judge. And so unless he sends that back to me, I'm going to send it to him. And I think that he would prefer to make that decision as well, especially since it's a bench trial where a district judge is going to have much more latitude on the conduct and how things will go. So I haven't put that in writing yet, but that's just to let you all know where I'm headed.

Mr. Treece, I believe you filed the first motion. I'll give you the first argument.

MR. TREECE: Thank you, Your Honor.

So as you know, we're before the Court on our motion to stay, and I understand the Court's comments with respect to bifurcation. I may mention bifurcation only to the extent it further supports the justification for the stay. And then we, of course, have Fluor's motion to compel.

I wanted to mention at the outset, though, that Fluor's motion to compel is not a true motion to compel. It is more in the way of opposition to our motion to stay. And I say that because there has been no meet and confer on any of the

specific requests. We have the general objection that we filed a motion to stay and it's inappropriate, and then we have individualized objections to much of the requests. And we haven't met and conferred. As you know, Fluor doesn't identify any specific set of requests that they're moving to compel on. So that's not ripe for resolution, but we do view it as an opposition to the motion to stay.

THE COURT: Is it fair to say, maybe just so I can understand exactly what your position is -- I didn't go through it, and I need to go through it and kind of look at all the different discovery requests -- is that if I grant the motion to stay, it is what it is; no discovery is going to go forward anyway.

If I deny the motion to stay, however, then to the extent that there are relevant interrogatories, discovery requests, documents to be produced, then we'll go forward on that. To the extent that there are further objections to specific interrogatories or specific requests, specific documents for whatever reason -- whether it be work product, attorney-client, whatever -- that would then be subject to a meet and confer, and we'd be back on that, if necessary? Is that the way you view that, Mr. Treece?

MR. TREECE: Well, slightly differently, Your Honor. But certainly for any of that to be ripe, we would have to meet and confer.

THE COURT: Right. Right.

MR. TREECE: Now, with respect to the requests themselves, as you'll see from the justification here, the discovery doesn't make sense for a variety of reasons, a lot of which also relate to bifurcation to the extent we get there, right? So compelling something that is going to be bifurcated, and not until later down the road, if ever, depending on resolution of the dispositive motions, I don't think it makes sense to have anything compelled. But if there is some subset that they want to compel, we did identify those requests that we thought --

THE COURT: But my question was prefaced upon the idea that -- and I'm not talking about bifurcation, but about staying -- is that if I do not stay the case, the understanding would be you'll proceed forward with discovery. If there are specific objections to specific requests, that would come back on a different motion to compel. Is that the way you understand it?

MR. TREECE: That's correct, Your Honor. And I did want to mention that in our briefs we identified specific requests that would go to the key contract interpretation issues. So again, still need the meet and confer process with that. But to the extent anything was going to be compelled, we're not going to get substantive discovery on that before the hearing anyway, but that would make sense. If you're trying to

identify some subset, the subset relating to the key contract interpretation issues -- which Your Honor is aware of from our informal hearing, and I'll mention again today -- that would be sort of a way to slice it in a way that could arguably be reasonable if we weren't having a hearing a month from now and it being inefficient. No substantive discovery would take place between now and then anyway. We'd only have a protective order, for example, and the interrogatories are largely blockbuster interrogatories. I mean, there's a number of issues there we don't need to delve into. But I think Your Honor understands our views on that.

Now, let me just kind of start at the outset and say that, you know, BAE's motion is timely. I'm going to walk through sort of the details on that. As you know, we're only seeking a short stay; that is, until the hearing on the 14th and resolution of the dispositive motions. Judge Urbanski, as Your Honor is aware, is often inclined to sort of give the parties his reaction to pleadings when they're heard before him. And so he may give the parties an indication of what way he's going without us having to wait for an ultimate resolution, but we anticipate having some sort of guidance. But ultimately it's just not efficient to address these issues until such time as the motion is ruled upon.

Now, with respect to our dispositive motion, Fluor has sort of mischaracterized those as relating to only part of

the issues in this case. We spelled that out in our papers where -- our dispositive motion through the entirety of their claim. And most of what we're dealing with, with respect to bifurcation and all of those issues relates to unambiguous contract provisions, right? This is design responsibility. This is the enforceability of the $30 million damages. These are unambiguous contract issues. I know Fluor wants to do all this discovery into parole evidence, but as a matter of contract law, they're got going to get there. And if they do get there because Judge Urbanski, you know, doesn't agree with us that it's unambiguous, then at a minimum there we can address that through the bifurcation and we can have a limited hearing on those issues, a limited number of depositions, a short, you know, multi-day hearing if necessary, but not a three-week trial which we could deal with later.

So we've got the motion to dismiss, and the four corners of the contract spell out the parties' obligations. And in Fluor's brief they keep citing something we said in a brief which they're taking out of context. And that relates to the process design. And I'll just mention with process design, Your Honor, the obligation of BAE was to procure equipment. They talk a lot about Appendix G. We'll talk about that. But Appendix G in the contract relates to equipment specifications. It is not a design requirement. It is just the equipment.

Your Honor, if you wanted to build a house and you

want a slate roof on your house, you hire a contractor. You say, "Contractor, I want you to build a house. I want a slate roof on that house." You telling them you want a slate roof is not a design. That is a specification. If you've seen in their brief, they try to support their arguments with a single attachment which talks about a valve. That's exactly what we're talking about, is the only thing that they can point to in the contract -- and this is really for Judge Urbanski -- but it's discrete components. It's equipment. It's a pump and a valve. It is not a design. They talk about P&IDs and things like that, but the scope of work expressly says this is two-point drawings, specifications, technical drawings provided in Appendix G, which is what Fluor is relying so heavily on now. It goes on to say, These drawings are provided for reference only. The subcontractor shall prepare their own drawings to be used for the design submittals.

The bottom line, Your Honor, is this is a strict contract interpretation issue, and it's to the tune of in excess of 100 million and really 150 million PCNs that we're talking about, proposed change notices. So as a matter of strict contract interpretation, Judge Urbanski can kick out $150 million worth of what Fluor is claiming is in dispute. And then, of course, we have the limitation on damages of 30 million.

Now, Your Honor mentioned in our December 1st call

that, Well, isn't this in the nature of a med mal cap and will be applied later? It's much different here, Your Honor. If you're doing a med mal case, you're going to prove the harm to the patient, right? And you're going to prove it anyway, and then the cap is what it is. Here we're dealing with a vast number of PCNs to the tune of $200 million. If the case is limited to $30 million, we're going to take a lot fewer depositions, everybody is not going to go to the ends of the earth to prove every who shot John with every PCN. What Fluor is likely to do as a practical matter is pick what they think are their most compelling PCNs, and we're going to be dealing with that. So practically speaking, it's true Fluor may have the right to prove up PCNs, but practically the case is not going to be the same. The proportionality analysis under Rule 26 with the amount in dispute is not going to be the same. It is going to be a much different case. We're not going to hire as many experts, presumably.

THE COURT: But whether you stay discovery or not on that particular issue doesn't really matter. I mean, if Judge Urbanski rules four weeks or so after your hearing that it's limited to $30 million and he's only going to allow $30 million of damages to be put on, then your discovery is still going to go forward and Fluor is going to make a decision as to which claims it's going to pursue. It may change its mind from the beginning to the end as to which one it finds to be the

strongest. It doesn't mean that that's going to limit the discovery on those.

MR. TREECE: Your Honor, I understand your point there. So first, the motion to dismiss is sort of principally going to eliminate all of it, in our view, based on strict contract interpretation and the fact that these terms are unambiguous. The 30 million, though, as a practical matter, is going to substantially affect how discovery ensues, right? And I'm not saying that Fluor is going to be limited. If Fluor wanted to spend a ridiculous amount to prove all of these $200 million in changes, I mean, that would be their own decision to waste that money. But if they're trying to compel a bunch of stuff from us, you know, I think certainly the Court should factor into whatever the analysis is with respect to whatever they're requesting whether it makes sense to do it, if, you know, it's a $30 million case versus a $200 million case.

THE COURT: Both are a lot of money.

MR. TREECE: Well, I understand both are a lot of money in the context of cases generally. In the context of this case, I mean, think $30 versus $200. It's a vast difference from a proportional perspective, and it's a proportionality analysis, right?

THE COURT: Right. But that -- so I don't know whether one claim may be worth 100 million and then three or four others are worth 20 or 30 million apiece, as opposed to

there are 200 claims, each of which is worth a million dollars, right? And I think there's a difference in the nature of the discovery in that regard.

MR. TREECE: And I understand Your Honor's point on that. I mean, our driving principle here is the motions to dismiss are the largely dispositive issue. And practically speaking, limiting damages to 30 million will have a substantive impact on discovery. Now, exactly the parameters and the scope of that, that's harder to define, but I think it's plain it will. And then, of course, if only -- I say only 30 million, but in the context of this case where the NC facility is a $250 million project, you know, if only 30 million are in dispute, it's more likely to bring the parties closer together for resolution discussions. Now, obviously, no way to predict how that would go. But it will dramatically impact the case and how it proceeds in any event is sort of where we wanted to make our point on that.

Now, getting to the timeliness of our motion to stay, Your Honor is aware there were two lawsuits filed initially. You know, we filed first. It got assigned to Judge Conrad. Fluor filed second, a separate case, and got assigned to Judge Dillon. Then we filed a motion consolidate. And the parties agreed that, look, while we're working out this motion to consolidate, everything is going to be stayed, right? So there was an agreement not to do anything until there was a ruling on

the motion to consolidate.

We had a hearing with Judge Urbanski in I believe April where he addressed the motion to consolidate. During that hearing we raised the issue of bifurcation with Judge Urbanski. So it came up in that context. After that hearing Judge Urbanski said, all right, everybody needs to file their responsive pleadings. Everybody needs to file their dispositive motions so we can get everything on file. We did that.

Thereafter, we had the 26(f) conference. The 26(f) conference lasted an hour. A large topic there was the stay and bifurcation in light of the motions to dismiss that had been filed by that time. That was memorialized, of course, in our 26(f) report. And our 26(f) report expressly says BAE informed Fluor that, quote, Discovery could change substantially depending on the outcome of the parties' pending motions under Rule 12(b)(6) and 12(f).

And BAE raised the possibility of a motion to bifurcate and stay during the discovery conference. At no point since has BAE ever indicated that they were doing anything other than moving to stay and bifurcate once discovery was issued to BAE. But since our July 26(f) conference, Fluor elected not to issue discovery, and BAE took that as an implicit recognition that they saw the wisdom in not moving forward with discovery until resolution of the dispositive

motions there. But in our call with Your Honor on December 1st you asked Mr. Fitzsimmons if the parties had conferred on bifurcation, and he told you no. I have zero idea where he came up with that, because that's entirely contravened by our entire dealings and past conferring on the motion to bifurcate.

Now, what precipitated our motion is we thought Fluor was not going to move forward with discovery as to BAE, and so there was no need to trouble the Court with any filing, but then on October 15th we got discovery requests. After we got those discovery requests, of course, we realized that Fluor is going to try to take discovery before resolution on the motions. And that doesn't make any sense, so we immediately prepared our motion to stay and bifurcate.

Before our responses were due I emailed Mr. Fitzsimmons, and I said, We have prepared our motion to stay and bifurcate for filing tomorrow. And this is, again, a week before our responses were due. He told me that if we tried to file first, he wanted to meet and confer again on the issues; and that if we tried to file it, he would object because it's not procedurally proper. I explained to him I disagreed with his views there because we had met and conferred, and this was not really the nature of the issue that goes to the informal resolution process because we're not -- there is nothing to resolve. If you flatly disagree with us, and we've met and conferred on it, it just makes sense to file

it. So we were prepared to file on the 12th, Your Honor. And here we are on the 15th, and Fluor is trying to say that we're delaying. We could have filed on the 11th if they didn't want to meet and confer further and insist on the informal conference. But that was their request to do so, and we obliged them. And we were hopeful that they were going to change their tune in the meet and confer, but they took the same approach, which is no, we just flatly disagree with you. I proposed in that call -- I said, Well, Scott, why don't we wait until -- we can wait on filing bifurcation. Why don't we wait until the hearing, and maybe at the hearing Judge Urbanski will give us some guidance, and then we're only waiting a matter of weeks. And he wouldn't entertain that as an option. So we were left with no choice but to file our motion and certainly proceed first with an informal conference that Fluor insisted that conduct there.

So the bottom line, Your Honor, is our motion is timely. And the only reason it wasn't filed before our discovery responses were due is because Fluor insisted that we not do so, and essentially said, you know, if you try to do it, we're going to, you know, tell the Court that you're violating all these rules. We said, All right, well, look, if you want to meet and confer and you think that's beneficial, we're happy to do that. If you want to set a call with Judge Ballou, we're happy to do that. So that is the reason our motion was filed

when it was.

I've already talked about the short stay, but really the efficiencies gained from the stay make up for any delay. If Judge Urbanski agrees with us that this is an unambiguous contract interpretation issue as to the motion to dismiss and the damages cap, then limiting and removing those issues from the case substantially limit the amount of discovery we're going to have for the remainder of the discovery period. So it's just efficient not to engage in, you know, unbridled broad-sweeping discovery, when in a matter of weeks we may know more that will prevent us from having to do broad-sweeping unbridled discovery. So that's where we are with respect to that.

Now, on the substance of their arguments with the motion to dismiss -- and we get into this only because, you know, it is appropriate for Your Honor to look somewhat at the merits of the motion to dismiss. And it's plain that the merits of our motion to dismiss are sound, and in our view likely to be granted by Judge Urbanski. Again, we can eliminate everything relating to design responsibility. The contract is crystal clear that Fluor has overall design responsibility for the contract. The only thing BAE did was supply equipment specifications. And I mentioned they talk about P&IDs that were redlined. Again, it goes on to say in the contract, 2.2, drawing specifications and technical

documents provided in Appendix G are for reference only. There is no requirement for them to rely on that. The only specifications in Appendix G that they are talking about, they're trying to make it seem as if drawings and specs are the same thing. Not at all. They're talking valves, pumps, which is what you see in their attachment. Again, that is nothing more than you building a house and saying, I want a gray slate roof. And then, of course, the contractor who is constructing it has to figure out how to design a house that can withstand the weight of that slate roof. That's not you because you're saying, Contractor, I want a slate roof.

So that's where we are on that. But with the period leading up to this, which they make much about because of the Lauren Design, there was an eight-month bid period here. And Fluor contractually agreed to be the design-build contractor on this. There were certain data provided from Lauren, the prior contractor, to all bidders, including Fluor, but it was expressly as is. And I'll read you what it says. This is in -- this is the cut-out from the language there: "Native files from previous contractor will be provided as they are received. Files are as is based on work in progress at the time of termination of the previous contractor."

They knew it was incomplete. In fact, they talked to Burns & Mack before they signed the contract. Burns & Mack is a design firm. Burns and Mack looked at it and they said,

Look, we would start from scratch. We wouldn't take this. Burns & Mack ultimately was not used by Fluor as a design firm, but the bottom line is they knew since the outset that what they were getting was a conceptual design as is. It's not incorporated anywhere in the subcontract at all. And so, that's one of the issues for Judge Urbanski. He can make that discrete ruling, and then we're lopping off hundreds of millions of dollars of PCNs just by that decision.

Now, during the bid process Fluor was alerted that they've got to validate, correct, and complete the conceptual design, if they end up using it. And the statement of work is just crystal clear. The statement of work says the definition of work: All of the design. It goes on to say in the statement of work, The objective of this statement of work is to design and procure and construct. The subcontractor shall prepare their own drawings to be used for design review submittals, construction, and as record drawings.

They've got the responsibility to construct this thing.

It is incumbent upon the subcontractor to review the documents submitted and to perform their own analysis. The subcontractor shall be solely responsible for the design.

Now, what they're talking about with the process design, just so Your Honor can be aware of how they're trying to conflate the two and make it seem as if there's some big

area of uncertainty that needs discovery, the process design is the machinery that makes the nitrocellulose, right? That is from Boas, a company I think out of Germany that specializes in this proprietary design for making nitrocellulose. But this is no different than any other facility or factory that Fluor would design and construct. If Fluor is building a chemical plant for Dow, they don't know how to make the chemical process. They're going to rely on Dow to get the equipment, which is what they did here. But they've got the obligation to design the overall facility. That's their obligation. It's not -- it's not a design obligation. It's a specification issue is what it amounts to. But the subcontractor is crystal clear on this.

And again, Exhibit G is -- Exhibit G itself is entitled, "Equipment specifications," not drawings, not -- it's equipment specifications like a valve or a pump. This is actually a very straightforward issue sort of despite Fluor's efforts to make it seem like a convoluted -- I think Mr. Fitzsimmons called it a bowl of spaghetti. As difficult as he wants to make it, it's clear in the contract. So that is what it is.

So I think I've addressed all the issues there with respect to their process argument and the red herring with that. But at the end of the day what they're trying to do is take a firm fixed price contract and then look at all of their

errors and failures and say, Well, you know what? We blame these on something we got from you, and so we're issuing all these PCNs. But it's a very clean, discrete issue in terms of the issue is: Who has design responsibility? That's resolved on the contract. Is there a $30 million damages cap? That's resolved on the contract. And again, in the unlikely event the parole evidence is required, bifurcation would address that issue by just doing a couple of depositions about the parties' intent when they entered these terms. But parole evidence is not permitted. Even course of performance, course of dealing subsequent to the contract is not admitted if it's unambiguous. And we provided the Court with the *Snowden* case in our papers which make that issue crystal clear.

So in our view, Your Honor, it's not even a close call. I mean, the motion to stay makes imminent sense here for all involved. It saves the cost across the board. You know, Fluor is trying to say, Oh, we're trying to shield evidence from the upcoming hearing. The upcoming hearing is a motion to dismiss. You can't go outside the pleadings. You can't use extrinsic evidence that's not in the pleadings. So if you -- so the bottom line is that's not permitted anyway. And then you've got the unambiguous issue that they can't use parole evidence anyway. So the combination of those two things just show that Fluor is sort of grasping to try to make this seem like some manipulative process, when really what we're doing is

it's just imminently reasonable and efficient to approach this in the way that we're proposing. It saves everyone money. It saves the Court time and expense. It saves the parties time and expense.

And we're talking about a matter of weeks, maybe months, in terms of two months before Judge Urbanski rules. But like I said, I would anticipate some sort of indication as to his views as to whether he thinks it's ambiguous or not, those kind of things. We had proposed to revisit with them at that time. You know, certainly got no traction when we made that proposal. But resolving these issues would result in minimal factual discovery, especially if we bifurcate, limited hearing on those issues. And we can perhaps resolve the vast majority of the case within a matter of months, and not have to do a three-week trial. I know that ties into bifurcation, but again, it just goes to the merits of the motion to stay and why it's imminently reasonable to do that here.

And with that, Your Honor, we would request that our motion to stay be granted and bifurcation obviously tabled for another day; their motion to compel denied, certainly, for the reasons stated in our motion to stay; and then also denied because it's not even ripe. There has been no meet and confer on any specific motion to compel.

THE COURT: All right.

MR. TREECE: Any specific interrogatory or request

for production.

THE COURT: Okay.

MR. TREECE: Thank you.

THE COURT: Thank you very much, Mr. Treece.

All right. Ms. Barnes, Mr. Fitzsimmons, who's going to argue on behalf of Fluor?

MS. BARNES: As soon as I unmute myself, I am going to argue on behalf of Fluor.

THE COURT: Let me start with a question, Ms. Barnes. Just in looking through the docket -- and I think this affects you-all's case a little bit more -- so I'm looking at the order Judge Urbanski entered on April the 30th dealing with consolidation, the repleading of your claims into counterclaims, and so forth. It says that once the claims alleged in the '596 case -- which I think is your case, the Fluor case -- are reasserted as counterclaims in -- the '596 case will be dismissed as duplicative. Are we at that stage? Can I suggest to Judge Urbanski that that step can be taken at this time? I asked you first because Fluor filed the case. I know Mr. Treece would absolutely agree that that case should be dismissed, but I wanted just to see if I could clean up at least that part of the docket.

MS. BARNES: Yeah. We don't see any reason why it needs to be there. We have filed our entire claim and the counterclaim, and it has been answered. So the issues are at

bar.

THE COURT: Let me just suggest to him -- I'll get a message over to him after this hearing that that action can be taken.

MS. BARNES: Okay.

THE COURT: So with that, Ms. Barnes, the floor is yours.

MS. BARNES: Okay. I will just say kind of in the order that all of these things came up, with regard to the motion to compel, Your Honor in our meeting to confer discussed the fact that we were not going to specific objections that may have been made to the request, that we were going to address the real reason that BAE did not respond to even one of the interrogatories or document requests. And that was because they assumed that they had somehow a de facto stay and did not have an obligation to respond to any discovery. They did not have any citation to any agreement between the parties, any letter that was issued by Fluor, any ruling by this Court, any case law, or any rule that would allow them simply to decide not to address discovery requests. We did have a meet and confer because we met with Your Honor, and we talked about the motion to compel, and Your Honor gave us the right to file a motion to compel on the issue with regard to the motion to stay.

THE COURT: But -- and I guess this goes to my

question to Mr. Treece is that if I agree with you regarding the motion to stay, there may be further work on specific objections that the parties need to then address. The only thing I would need to address as it relates to the motion to compel would be with respect to discovery there may be -- and you then have to deal with whatever objections are made -- whatever the substantive objections are.

MS. BARNES: Yes. And we understood that that was the case based on your statement at the end of our meeting. But none of the objections that BAE has made to any of the individual requests are objections that would permit them simply not to respond. Those are objections that you make -- that people make in every one of their responses to discovery, and then go ahead and provide responses subject to those objections. And so we don't see anything that would keep them to give responses, but for the fact that they decided that they didn't have to because they intended to file a motion to stay.

Okay. I'm going to start out with regard to the motion to stay on the issue of timeliness. And we heard Mr. Treece talk about the fact that there was a very detailed discussion in the Rule 26(f) conference about BAE's decision that they thought that they would file a motion to stay. What Mr. Treece did not also suggest is that there was also a very significant response from Fluor, that Fluor opposed any motion to stay. Fluor said -- and it was included in the Rule 26(f)

report -- that Fluor saw no reason for there to be a motion to stay pending a decision on the motions to dismiss. And we also spoke several times, including through emails, about not only the motion to stay and how that would work, but the motion to bifurcate. And we -- and I wrote the email myself and said to Mr. Treece, I really don't see what your plan is for bifurcation. It does not even make any sense what you're talking about in terms of how to bifurcate.

So there has never, in any of the months -- July, August, September, October, November -- there has not been any indication to BAE that, in using Mr. Treece's words, that we saw the wisdom of the motion to stay. We have not seen the wisdom of the motion to stay, and we still have not. And we never gave any suggestion of that.

But even if they thought Fluor may have seen the wisdom of the motion to stay, there is no motion to stay until the Court orders one. And so, saying we thought that Fluor might not file discovery is not an explanation of the failure to file a motion to stay if you really wanted discovery to be stayed. There also is not any explanation for what BAE calls participating in the place setting or the table setting discovery. They negotiated in significant negotiations that went on for weeks an ESI proposal and then an ESI order that we went through about how documents would be produced in this case. And then the parties have gone forward to deal with some

of the issues in the ESI protocol. We have filed a -- filed and served custodian emails. We have identified party custodians as responsible -- as required by the ESI protocol. We have identified non-custodial sources of documents. And Fluor has provided BAE with a proposed protective order. That was provided on October 19th. We have not heard anything back from BAE with regard to that. Fluor has provided BAE with proposed search terms that would be responsive to our document and interrogatory requests. Have heard nothing back from BAE on that.

THE COURT: Let me ask you -- and the idea that every judge can split every baby in some way -- is there a middle ground somewhere that brings you-all all the way up to the point of hitting the button to do the searches that invests so much attorney time and then having to review what's probably going to be millions of pages of documents here for discovery purposes and so forth, is there -- is there a ground that I could stake out that would say, I want you all to go forward with discovery; assume that you're going to have one set of discovery that leaves everything intact, and Judge Urbanski is going to say, what you all are talking about are things to be fleshed out in the motion for summary judgment stage, or there are going to be some things that are left. I know you're not going to buy completely that your counterclaim will be dismissed, but there are going to be some things that are left,

and here's our skinnied-down version of discovery. And then 30 days after Judge Urbanski's hearing, if he hasn't ruled we come back, we have a status conference and say, okay, maybe you can drive forward and start with discovery now, because we don't know how Judge Urbanski is going to rule? Is there a middle ground in that regard?

MS. BARNES: I think that the only middle ground that I could propose -- only because you're requiring me to do so, one I'm doing it under duress -- however, the middle ground that I would propose is that BAE responds fully and completely to the written discovery. This is not something that requires hundreds and hundreds of hours of attorney time. That the parties finish the negotiation of a protective order. So on the day that any partial stay is lifted, that the parties could start producing documents. That the parties propose and negotiate search terms which would allow also us to push the button and start collecting documents and determining what would be required. We also ask that there not be any stay on any third-party discovery. If BAE is concerned about its own time and attorney time, we have subpoenas out to the government with regard to its communication and involvement in this matter. We have a subpoena out to Lauren -- that was the original designer and the original supposed design-build subcontractor -- which was not objected to by BAE, neither of these -- neither of these subpoenas. We also intend to have a

subpoena -- and likely we'll have to do letters rogatory with regard to Boas, who is the contractor --

THE COURT: In Germany?

MS. BARNES: Yes. That was working on the process design. And that is a thing that could take a lot of time, and that we don't have time to sit around and not do anything on while we're waiting for a decision on the motion to dismiss.

And so we would ask that third-party discovery go forward; search terms; also that the parties work on and agree to a protective order so that there won't be any more roadblocks to production; and then that the written discovery in its entirety be responded to, because there really is no reason that interrogatories and document requests can't be responded to.

THE COURT: Okay. All right. I interrupted your --

MS. BARNES: That's okay.

THE COURT: I don't know if you remember where you were.

MS. BARNES: I do. I was talking about the timeline. And really not to belabor it, I think that in any way that BAE somehow tries to blame Fluor for their failure in the period between July and November to move for a stay should really just be rejected. There has been no conversation, no communication between BAE and Fluor which would lead BAE to believe that Fluor's position had changed with respect to the motion to

stay. BAE never reserved their rights as we were going forward with all of these discovery-related activities that they freely engaged in. They never reserved their rights to move to stay. They never raised the motion to stay at all. There was no reason for Fluor to believe that BAE still was considering a motion to stay. And then once Fluor filed its written discovery requests on October 15th, BAE then waited 26 days. They waited until four days before their discovery responses were due to even raise a motion to stay. So there was no reason for Fluor to even think that BAE was still considering a motion to stay, because the thing that BAE claims is real discovery, that had been filed. That had been served on October 15, 2021. And BAE stood silent for 26 days until four days before those responses were due before they even raised the motion to stay.

The other thing that really should be rejected as without any merit is BAE's continual statement that Fluor somehow was trying to delay them from filing a motion to stay. Fluor simply notified BAE of the requirements that are included in Judge Urbanski's scheduling order that says that any non-dispositive motion that relates to discovery must go first to Judge Ballou, and that the parties have to meet and confer. That is all we referred to. If BAE believed that that didn't apply to this specific discovery motion, they could have simply said: We refuse to do it. We refuse to meet and confer. But

they did not, because they know that the scheduling order specifically says that it's a requirement. And that is all we did is to suggest to BAE that filing a discovery motion without seeking a conference with Your Honor was in violation of the scheduling order that both of the parties agreed to.

So when you look at this holistically, this motion to stay is not only unnecessary because it's not going to help this case, it's not going to increase any efficiency, it's not going to narrow any discovery, and it certainly will prejudice Fluor; but it's also untimely. BAE had months to file this motion to stay, and they decided that they would not file it until it was too late for Fluor because they waited until four days before the document and interrogatory requests were due in order to say: We've got our motion to stay ready to file, and you should just realize you're not going to get any answers to your discovery requests. So that is all I will say on timeliness.

The other thing that I would also like to preface my remarks on the substance of this motion to stay is that it's hard to know what BAE actually is requesting here. BAE -- Mr. Treece said today, We would like to have the motion to stay until the January hearing or until the motions are decided because we think we'll get an indication. Is it until the January hearing or is it until the motions are decided?

We understand what has happened to the docket of the

courts based on the pandemic and how much there is before the courts at this time. And so we say with all due respect: We don't know that we're going to, number one, get any indication on January the 14th, or that we're going to get a decision on all three motions -- motion to dismiss by Fluor -- partial motion to dismiss by Fluor, motion to dismiss by BAE, and a motion to strike by BAE -- within a month, within two months, within three or four months of the hearing, because they're weighty motions, they're a lot to think about, and there are three of them on this one case that Judge Urbanski has. And we don't know what his criminal docket is or what else that he has before him. And so I certainly can't -- and neither can Mr. Treece -- guess how long it's going to take Judge Urbanski to reach decisions on these motions. And so a motion to stay until the hearings is really unnecessary, particularly if we're not going to know when Judge Urbanski can decide. And a motion to stay until the motions are decided could cut in half the time that is remaining for discovery. It could absolutely mean that we have to lose the trial date of March of 2023. And frankly, if we lose that trial date, I don't know when we will be able to get another three weeks before Judge Urbanski. And Fluor is not willing to lose that trial date based on a motion to stay where discovery is not going to be narrowed, and where there's going to be so much significant prejudice to Fluor if, in fact, we have to lose the trial date because of the motion

to stay.

And so I say that in either case -- whatever BAE is asking for this short motion to stay until January or for the conceivably much, much longer motion to stay until the motions are decided -- both are unnecessary; both will not increase efficiency; and both will be prejudicial to Fluor.

THE COURT: How much time -- all the claims are on the table?

MS. BARNES: Yes.

THE COURT: At least until a dispositive motion deadline. I didn't go back to look at you all's amended pretrial scheduling order, whether you extended the -- or lengthened the time before the trial for filing dispositive motions, but Judge Urbanski's normal rhythm is a discovery cutoff 90 days before, 75 days before file motions -- dispositive motions and motions regarding experts. If we're keeping that, then you're talking about sometime in the middle -- a year from now, basically, is when your discovery cutoff would be.

How long would discovery take if all the issues are on the table? Would it take the full 12 months or would it take -- could it be done in -- I'm not going to ask counsel to drop everything. I know this is an important case, but you also have other clients. Could it be done in six months? Would it take nine months? I don't know enough about the case

to be able to say how long a stay should be.

MS. BARNES: Well, we have certainly thrown around a lot of numbers in this case about the significant amounts that are at issue. There are just under 40 PCNs or change orders that Fluor is requesting; however, there are some that really encompass the entire project. One of those is about the overall delay to the project that was caused by the significant revisions to the process design, the immature Lauren Design, and then other directed changes that BAE made throughout the project. And so the overall delay is a significant, nearly $50 million change that Fluor has asked for.

On the other side, BAE is claiming that Fluor is responsible for all delay to the project. And so those issues have to be litigated and have to be discovered.

The other thing is that the parties have agreed that the ten and ten number of depositions is not going to be sufficient for this case.

THE COURT: Right.

MS. BARNES: So the parties have agreed to 20 and 20, so a total of 40 depositions in this case. And that obviously is going to have to happen after we get documents produced, and after the parties have a chance to review those documents and get ready for depositions. And 40 depositions, no matter how much focus that we put on this case, based on the fact that some people are not going to be employed by the parties

anymore, that people will have vacations and other matters that they have to deal with, we're going to have to have a lot of moving parts as to how we get people in and out of those depositions. And we can double track. We can triple track. Obviously, there are enough attorneys to do those kinds of things, but it's not going to mean that we're going to be able to do this -- discover this case in six months.

You know, the parties are also thinking about a number of experts on each side. And so we are not only going to have to deal with discovery of fact witnesses; then we'll have to deal with getting expert reports ready and then expert depositions and discovery of expert witnesses in time for the dispositive motions.

And so right now we have a November the 16th fact discovery deadline. That fact discovery deadline also anticipates that there may be additional expert discovery that is necessary after fact discovery. So we've got supplemental expert reports that can be issued after fact discovery is over. We will be doing expert discovery as fact discovery proceeds.

So my long answer to your fairly short question is that there is no way that we can do discovery in six months, that a year I think is going to be pushing it, which is the reason why we on Fluor's side have been trying to keep this case going as we, you know, even waited for the motions to dismiss, that we did all of the discovery procedures that the

parties have engaged in freely and willingly up until this time.

I know that we're not supposed to talk about other cases, but the parties also are involved in pretty much all of the same counsel in another case between Fluor and BAE before Judge Dillon. And that case is going to trial in September. So there is going to be some time that we -- in September of 2022. So there also is going to be some time that we have to take a time out and do that trial. And so that's the reason why we are so concerned about not wasting time waiting for decisions on a motion to dismiss that we think are not going to be granted. And I understand that there is a difference of opinion on that, but we sincerely think that these motions are not going to be granted and should not be granted.

And we also think that there is a severe prejudice to Fluor, who really is the plaintiff in this action, notwithstanding BAE's race to the courthouse, that we will be significantly prejudiced if we sit around for months because we are waiting for Judge Urbanski to rule on motions to dismiss and the motion to strike.

THE COURT: Anything further, Ms. Barnes?

MS. BARNES: Yes. I actually -- you might think I got through my --

THE COURT: Well, you paused long enough that I thought we were done. Go right ahead, please.

MS. BARNES: I will hasten to my close.

THE COURT: No. Take your time.

MS. BARNES: The important thing here with regard to this motion to stay, I think that there are kind of three questions that I will address as quickly as I can.

First, the Courts are going to look at will the motion to strike, will the motions to dismiss be granted? And if the motions to dismiss are granted, will the entire case be resolved? And then what is the prejudice to Fluor? I've spoken a lot about the prejudice to Fluor, so I think I will stand pat on that. But let's talk a little bit about whether or not the motion to dismiss and the motion to strike will be granted.

The initial question to be asked is: What are BAE's arguments? Because BAE's arguments have changed from the filing of their motion to dismiss not so much on their motion to strike, but definitely on their motion to dismiss to where we are now. And so, what Judge Urbanski is looking at now is going to be definitely different than what Judge Urbanski is going to hear when we go before him on January the 14th.

BAE's original arguments were these: That Fluor was hired to validate, correct, and complete the Lauren Design. There was no discussion about whether or not Fluor elected to use the Lauren Design, because BAE said that the contract required Fluor to validate, correct, and complete the Lauren

Design.

Secondly, what BAE originally said is that Fluor is responsible for the entire design scope, including the process design. If you look at page 12 of BAE's motion to dismiss, they say Fluor's attempt to separate out the process design from the rest of the design is contrary to Fluor's understanding of its scope. Fluor breaks its work under the subcontract into six major design packages, the fifth of which is the full process package.

So we're not guessing, we're not hoping, we're not delusional when we say that BAE has argued to the Court that Fluor was responsible for the process design. BAE has done a full 180 now to argue now what is the truth under the contract. BAE is responsible for the process design.

I will talk about this whole validate, correct, and complete question first. BAE makes these statements as if they're quoting from the subcontract, but the contract doesn't include this language. The contract says that Fluor will validate and complete, but never says that Fluor will correct. What the contract says is that the only party that is going to correct the Lauren Design is BAE. BAE says that the drawings, specifications and technical documents in Appendix G, which is where the Lauren Design is, have been corrected and amended to include additional requirements. So all of this discussion and argument about Fluor electing to use the Lauren Design, that is

unambiguous. It is unambiguous that the contract requires Fluor to comply with the Lauren Design and requires Fluor to use the corrections and amendments that BAE made to the Lauren Design to do its design work. The contract does not anticipate that Fluor is going to correct the corrections that have already been made by BAE. And BAE already says in the contract that they have already corrected and amended the Lauren Design. Therefore, all of the discussion about these -- this language that would disclaim any responsibility or any implied warranty also is overcome by the very specific words of the contract. The Lauren Design is no longer as is, because it has been amended and corrected by BAE before it was included in the contract. Also, those designs are not for reference only because they are required to be used by Fluor. And the courts, the Virginia courts -- and we talked about this a lot in our motion to dismiss -- say that broad language talking about verification and completing and correcting does not overcome the implied warranty of specifications that Virginia law acknowledges. And BAE has that implied warranty of specifications over the Lauren Design.

With regard to the process design, now that BAE has admitted the truth that it is responsible for the process design, the next thing that they want to do is to minimize any, you know, involvement of the process design; the process design is nothing. But as we included in our -- our opposition to the

motion to the stay, the process design -- in BAE's own complaint, the process design was critical because it described the detailed layout of the complex web of piping required by the project. Without it, the construction of the NB and SB, as well as many follow-on activities, could not occur as planned, and sometimes not at all.

I was trying to think of a good analogy for what this process design is, because very frankly, at this point I don't understand the nitrocellulose process design yet, and I certainly don't expect you to, Your Honor. But I thought of perhaps the design of a plane, and that there is a design of the engine in the plane. And that is like the -- (inaudible) -- because BAE was not only responsible for equipment, as they say, but also for doing the entire throughput model for showing the model of how the process is going to work, and what that complex web of piping is that would allow the process to work. In an airplane, there is an engine. If the engine is 50 pounds heavier, then the materials that are in the -- that are -- that make up the airplane that are in the fuselage may have to be lighter, you might have to change the materials, you might have to change how the wings are made.

And so what we are saying, that when BAE continually changed the process design, either by changing the height of the equipment or changing the way that the piping that Fluor was designing would contact the equipment, changing the

orientation of the equipment, that would change Fluor's work, and that would cause Fluor to incur additional design and maybe construction cost. And so it's not just two pieces of equipment that you plop down on some concrete pads and switch the lights on. No. There is a complex web of piping which BAE says in its complaint that Fluor has to integrate into those pieces of equipment. And Fluor has to figure out how to do that based on the orientation of the equipment, the measurements of the equipment, what the equipment will do, what the throughput model is, what the hazard analysis is. And all of those things were the responsibilities of BAE. And BAE continued to change the specification, the requirements of the design process throughout performance of the contract. And that is a huge part of what this claim is about.

And so I go back to throwing out the numbers, throwing out 100 million, throwing out we'll get rid of all of this claim. That's really not the case. Number 1, BAE's motions to dismiss does not identify any specific PCNs that should be dismissed, because they are wholly part of what is Fluor's design responsibility. So simply saying that this is not Fluor's responsibility does not get rid of the case because it is a factual analysis as to what the PCNs go through, and we're going to have to do discovery on all of that. So Judge Urbanski is not going to resolve that question, even if he does so on January the 14th. So there is going to be significant

PCNs that relate to the process design.

The other thing that Judge Urbanski is not going to resolve is directed changes. Throughout the performance of the project, both design and construction, BAE directed changes to the work. And BAE says that they're trying to resolve that now by saying that Fluor didn't give notice or Fluor didn't request approval. But this is a motion to dismiss. And on the motion to dismiss, the Court takes the well-pleaded facts that Fluor has argued and accepts those as true, including all inferences. Fluor has argued and claims in its counterclaim in several places in several paragraphs -- paragraph 210, paragraph 229, paragraph 230, paragraph 237 -- that Fluor has met all conditions precedent, and that they all have been performed, and that there was timely notice given with respect to all of its claims. So the resolution of the directed and constructed changes that BAE required throughout the project, that's not going to be resolved. We're going to still need discovery on all of those issues.

So we argue that not only are there going to remain significant issues with the process design; we also believe that there is an implied warrant of specifications that BAE owes Fluor on the Lauren Design. And that -- I'm not going to go back through that again, but that is addressed in our motion to dismiss.

We've talked a lot also regarding this motion to

strike with regard to the limitation on damages. Well, there are three points I want to make very quickly about that. First, under the plain language of the contract, the limitation of damages clause does not address Fluor's changes claims. The limitation of damages clause begins with, "except as otherwise provided herein." And there is a changes clause that specifically addresses the documents, the claims, and the damages that Fluor is making in this lawsuit. And so we believe that on its face the clauses that BAE is seeking to use to limit this case to $30 million, it doesn't even apply here.

Secondly, even if the Court says, okay, maybe I don't want to agree with that, there is not one limitation of damages clause that the Court will have to look at and say, I can read this. There are three clauses, and those clauses are not the same. There are two clauses that refer to changes, one clause that does not. So at the very least, the intent of the parties is ambiguous. And so the Court cannot decide on a motion to dismiss that where there are three clauses that are not the same, that somehow this is what the clause says.

And then finally, there is a Virginia statute that prohibits exactly what BAE is trying to do, which is to limit Fluor's ability to recover for work that it has performed. And that is a Virginia statute that just came out, I believe it's in 2015. And we have looked -- and we continue to look -- to see if there is even one case that addresses that statute. And

there is not. So this is going to be a case of first impression. The Court will have to decide on a motion to dismiss whether or not this clause relates to that statute. And number 1, we don't think that Judge Urbanski can or should do that, and decide that motion on first impression. And it also means that Fluor is unlikely to just let it go, that Fluor is much more likely to pursue this through appeal, and therefore will have to prove all of its damages in order to go to appeal and ask the Court of Appeals to overturn the decision and allow it to recover its rightful damages.

So I am trying not to go over everything, but I think I have addressed this. What I want to say is that I really believe here that these are not motions that are going to be decided on a motion to dismiss. They are far more complex. They are not motions where the judge can simply open up a statute and say: I'm going to calculate the statute of limitations; you're out. These are very complex decisions regarding the contract, where there is competing language in the contract. And I think that it's going to take much more than a motion to dismiss. And that's why we are asking the Court to find that this motion to stay cannot be grounded in any motions to dismiss that are likely to be granted, and that there will be a significant prejudice to Fluor if the motions to dismiss are granted.

THE COURT: Thank you.

MS. BARNES: And also grant our motion to compel, which I think I said before.

THE COURT: If you didn't say it, I knew you didn't give up the motion.

MS. BARNES: Right.

THE COURT: Thank you very much.

All right. Mr. Treece, let me -- I'll give you the final argument. Let me ask you to confine it really just to two things, because you all have -- you've well covered the waterfront on the substantive issues of the motions to dismiss. My initial question is that it may be a fool's errand for me to go in and suggest what Judge Urbanski may or may not do on these things because he's going to take his own read of it.

My concern is this: Regardless of what Judge Urbanski does -- unless he rules fully, completely, and he gives you a narrow case going forward -- that by the time he rules -- so this is January the 22nd. If he rules, if it takes him 30 days, if it takes him 60 days, by October you have to be disclosing your experts and your discovery is done by November. Your dispositive motions are done essentially a year from now. My concern is that you're going to run out of time.

And so, one, how do I avoid that, because I view my role as somewhat of a mass unit to make sure that the case is triaged and ready to go when it's time to get to Judge Urbanski for substantive decisions.

And then secondly, if you can't -- beyond dealing with that, why not essentially bring yourself all the way up to the point at which there is significant attorney time that's being spent? In other words, I asked Ms. Barnes, What's the middle ground? Answer discovery fully. Allow discovery to proceed as to third parties. If third parties want to make objections, they can certainly do so. Let documents come in, in that regard, and proceed as it relates to those. And then maybe I have a status conference at the end of February, 30 days after the hearing. If Judge Urbanski hasn't ruled, maybe I'll look to stay. Maybe I don't.

Address those two things. I don't need you to go back through the substantive issues of the motions to dismiss and the motions to --

MR. TREECE: Certainly, Your Honor. And the answer is actually quite simple, and it's the reason we're doing what we're doing.

So again, what Fluor is trying to do is kind of discovery across the board on everything, and then wait until the end of the case to figure out who has design responsibility under the terms of the contract. What.

We're saying is this $50 million delay claim that you've asserted, it's contingent upon who has design responsibility under the terms of the contract. So even if Judge Urbanski doesn't grant the motion to dismiss, you

bifurcate discovery and you figure out who has design responsibility under the terms of the contract, right? And you limit the issues to those contract interpretation issues, and that will tell you what needs to be done. If we do that, then a lot of the -- you know, the meat of a lot of PCNs won't have to be dug into as deeply because it's going to cut one way or another, right? I mean, it's who has design responsibility. So that is the big ticket issue that is clear in the contract. And I'm not trying to get off track there, but, I mean, I've read to you the requirements, and what they're saying is based on assertions in a brief or other things that are independent of the contract itself. But if we bifurcate the contract interpretation issues, those can be resolved in a matter of months with a limited number of deponents.

Now, again, they make the assertion about 40 depositions, right? But if we bifurcate and we figure out who has design responsibility, that's going to eliminate a lot of the in-the-weeds discovery on the specific PCNs that are contingent entirely upon who has design responsibility. This issue about the 85 percent, if you read through their counterclaim, most of their counterclaim is about a precontract representation of 85 percent. The contract is fully integrated. There is no percent completion representation in the contract. They're asking for this -- you know, for a middle ground they want a full and complete response to

discovery requests. That is not possible for a number of reasons, mostly because they're contingent interrogatories. But their first interrogatory: Identify and describe in detail all factual, legal, or contractual bases, reasons, or rationales, or arguments for each of the representations to Fluor during the proposal period that the Lauren Design was 85 percent complete, an estimation of 85 percent complete, etc., etc., including -- this is all a single interrogatory -- including during these meetings in March, April, June, August, October.

If Judge Urbanski recognizes, as he should, or we establish through parole evidence that there is no 85 percent representation in the contract, that doesn't need to be answered. A vast amount of documents don't need to be exchanged about the precontract period of 85 percent because it's a nonissue. And if it turns out to be an issue, we'll know that, but we can do it in a very measured approach where everybody is not throwing all resources scattered across every issue in the case at once. We're targeting the big ticket things to find out who really has the obligation here? What does the contract really say?

That is the efficient way to proceed. If we do that, we could be ready by October, because I think when we get to these issues, a lot of that is going to be out the window, even if we have to do limited discovery of the contract

interpretation issues. That's not that complicated. What is complicated is seven years of contract performance for every PCN when those could be lopped off entirely or addressed largely by who has design responsibility.

I mean, their interrogatories and requests are largely the same. As Your Honor would call them, they're blockbuster interrogatories. You know, they're asking for every single -- identify and describe in detail all communications, including without limitation all meetings, conferences, phone calls, or oral communications, whether internal or external, held between BAE and Lauren in which BAE reviewed, addressed, or discussed Lauren and the grounds for termination, the maturity of the Lauren Design, including the percent complete. That's a single interrogatory. We have to do a vast amount of document discovery to even answer that interrogatory to identify all meetings, conferences, phone calls, oral communications. It just -- it's not even possible. It's just broad-sweeping, scattershot, let's discover everything. And, you know, they may not be doing this to impose costs on BAE to make the case painful. They may be doing it for legitimate reasons, but there is no need to do it for those legitimate reasons when the case can be reasonably streamlined in a manner that addresses -- well, first find out who has the obligation before you have to go in and get to the meat of every single PCN and who shot John with every single

PCN.

So in terms of the timing, if we do bifurcation on the contract interpretation issues, it is going to cleanly address a vast majority of these issues. Now, we may have to deal with individual PCNs that remain, and maybe some do remain. But those are going to be small in comparison to what we're dealing with, with: Who has the design issue? Is there a percent completion representation? Is the damages cap ambiguous? And that's a great example on the damages cap. I mean, the damages cap is addressed in three provisions. Two of the provisions say expressly 30 million is defined as the value of all changes. And there is another place where it says it's limited to 30 million. It doesn't -- that other provision in no way conflicts or alters the meaning of the other two assertions that 30 million is defined as the value of all changes. They want to try to make it that way, of course, because they don't want to be capped, but it is unambiguous. And, you know, a disagreement over what terms mean, as the Court is aware, doesn't make a provision ambiguous because the contract speaks for itself and it's for the Court to determine. So even a disagreement there.

Now, with respect to what could be, you know, materially severed, if they want to do third-party discovery that doesn't impose cost on BAE for the full gamut of 200 million, that's between them and the third parties that they're

subpoenaing is the way we would view that. And so if they want to spin their wheel -- in our view, spin their wheels doing that, then they're free to do that.

What we're trying to do is -- if we were the third party, we would probably take the same position. But we're trying to organize this in a reasonable, structured way that can address these in an incremental process that makes it efficient, rather than let's just run with everybody to the end of the road and get as many experts as we can, and then realize in October, oh, well, a vast majority of these claims are no longer relevant. Sorry you hired experts to opine on all these issues. They're no longer issues. It doesn't make sense to do that.

So the third-party discovery I would say is something they can consider. Answering fully and entirely their discovery request, as I have just demonstrated, is not possible. And it largely goes to irrelevant issues -- or it goes to contract interpretation issues that once we know that, whether we have to dig through all the evidence to find every single communication with Lauren that talked about percent complete, that talked about the maturity of the design, anything along those lines, that may or may not be an issue, but we don't -- we can easily know whether that's an issue, but this is all going to require a vast amount of document discovery. And there is no way the parties are going to be in

a position to do document discovery before the hearing, and certainly probably for a month after. Now, we can take steps to engage in that process. But again, even with search terms, I mean, if we framed them -- if we separated search terms of here's search terms we agree we wouldn't need to do, like 85 percent complete, you know, those kind of things, if we kind of separated them along those two lines and then realized that, oh, we never have to run these -- or design responsibility, we never have to run these because the contract is clear, then maybe we could do that. I mean, I don't think it would take too much to kind of separate two groups of if it remains, presumably we would go back and forth on that.

So those are things we can do. But trying to answer these -- and, you know, if we don't answer them, we put objections in there, you stand on your objections. And that's where we are. And we get a lot of these blockbuster contingent interrogatories, and the document requests go to issues that are irrelevant. So that's kind of how we would view structuring. If third-party discovery is okay, perhaps we can negotiate on search terms and do two tiers of search terms. Those search terms that we would pull the trigger on, if we're doing limited discovery on the contract interpretation issues first, those we would pull the trigger on if we're doing, you know, full scale discovery without any sort of, you know, streamlined approach to try to target and limit this in a

reasonable way.

So that's what I would say to address Your Honor's points with respect to those issues. I don't think there is much else Your Honor would want to hear from me. I have a lot of other responses, but I'll table those unless Your Honor has questions.

THE COURT: No. That's fine.

I think I understand well where everybody is. I have not forgotten our discussions by informal discovery conference as well. I think we have well covered it.

I'm going to work on an opinion. I'm going to get something out -- my goal is to get something out before the end of next week before Christmas. Certainly it will be before the 1st, because I'm going to be gone the first part of January. Whatever decision I make, I may want to wind up and give to Judge Urbanski anyway. And I want there to be plenty of time to get that issue beforehand if you want to. So I'm going to -- I'll take it under advisement.

Anything else we need to address, Mr. Treece?

MR. TREECE: No, Your Honor. Thank you for your time. I know we ran probably later than we all expected.

THE COURT: Ms. Barnes, anything else?

MS. BARNES: Not from me. Thank you, Your Honor.

THE COURT: Thank you all very much. I very much appreciate everybody being on.

I hope we can get Mr. Conte out of witness protection sometime soon.

(Laughter).

MS. BARNES: We'll contact him in Arizona.

THE COURT: Let me just say this: I know there are a lot of issues in this case. I know there's a lot that's very important to the parties. Let me just say I very much appreciate the way in which the lawyers are approaching this, and that is it's clear that you all are professional friends and have a great deal of professional respect and enjoy the work that you do. You do it well, and you do it well on behalf of your clients. And it really is a joy to sit here and watch good lawyers do their work, but also be able to communicate in such an amicable and civil way in a case that I know is very, very important. So I just want to thank you for that and commend you all for that as well. And I don't say it just to try to sound nice or be nice, but I think it's important, especially since we have clients on this call, for them to appreciate that that's not all the cases that I see. And so I very much appreciate it and I'll get something out to you all soon. If I don't talk to you, everyone have a wonderful holiday.

(Proceedings concluded, 5:24 p.m.)

C E R T I F I C A T E

I, Lisa M. Blair, RMR/CRR, Official Court Reporter for the United States District Court for the Western District of Virginia, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a correct transcript of the proceedings reported by me using the stenotype reporting method in conjunction with computer-aided transcription, and that same is a true and correct transcript to the best of my ability and understanding.

I further certify that the transcript fees and format comply with those prescribed by the Court and the Judicial Conference of the United States.

/s/ Lisa M. Blair Date: January 10, 2022